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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses	)	GN Docket No. 96-113

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COMMENTS ON THE NOTICE OF INQUIRY
by
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")

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SUMMARY

America's Carriers Telecommunication Association ("ACTA") welcomes the opportunity to address issues and provide facts concerning the status of small businesses in the telecommunications industry. ACTA supports focused efforts not only to lower barriers to entry, but also to lower barriers to the ability of small businesses to survive once they have entered the business.

ACTA's comments focus primarily on the barriers erected by federal regulatory policy, the lack thereof, and the critical need to improve enforcement of policy and rules. In this area, ACTA has reviewed the problems with the Commission's complaint procedures and proposed new procedures to streamline and make more effective the ability to address and resolve disputes certain to arise between small businesses and their much larger incumbent competitors.

ACTA reviews the historical record on Commission policies intended to: (1) introduce competition to replace traditional regulatory oversight; and (2) the results of those attempts. ACTA finds that the results are mixed. Unquestionably, pro-competition initiatives have made it possible for small businesses to obtain a place in the industry. But, over time, their position has been besieged by the backlash of the incumbent carriers' efforts to protect their domains. All too often, well-intentioned programs, such as ONA, have failed to produce their intended results of increased competition and thereby the greater participation of small businesses in the industry. In ACTA's view, this has occurred not from a failure to incorporate, at least at the outset, the rules and principles by which to achieve the desired competition, but by an unseemly hasty retreat from the enforcement and official support for the constituent elements of those programs holding the most promise for effecting competitive entry and survival. Indeed, an analysis would reveal that while

policies have been adopted to provide both opportunity for entry and survival, the aftermath of retreat from substantive principles, accompanied by lax enforcement, doomed any chance for survival, making the entry that was achieved short-lived and ineffectual.

ACTA also comments to encourage the Commission to avoid, at this juncture of the development of national jurisprudence, becoming engaged in a wasteful attempt to address race and gender issues. In light of the Supreme Court's decision in Adarand, efforts to assist small businesses should be based solely on their status as small businesses. Effective promotion of small business entry and survival will advance the potential of all firms, including those owned by minorities and women. Indeed, a subset of small business should be viewed as inherently incorporating the concept of minority and women ownership.

There are inherent disadvantages confronting small businesses in any industry. ACTA recognizes that it is not necessarily the task of the government to attempt to eliminate each of these disadvantages. Rather, the Commission must ensure that government does not add to those disadvantages. Often, the actions and inactions of the past have done just that; not by application of onerous regulation (although in some segments of the industry, such as payphones and with OSPs, there has been overreaction leading to heavy-handed regulatory responses), but by actions which have added to the inherent competitive advantages of the incumbent members of the industry.

ACTA also suggests an approach for the proper, pro-small-business administration of the Telecommunications Development Fund. ACTA submits that the TDF should be focused on funding traditional business needs and avoid becoming a fund based on achieving "greater social or advanced technological" type goals. ACTA perceives the danger in the latter approach as rendering ineffective the use of the TDF to help build a stronger small business base within the

industry and as a subliminal way of preventing small businesses from becoming more potent competitors in core lines of competition. The result will be to perpetuate the limited circumscribed role of small businesses as true competitors to the incumbents. At the same, such a misuse of the TDF will use small businesses with advanced ideas as the guinea pigs to test new technologies which the incumbents can then compromise by acquisition or predatory practices. Similarly, if small businesses proposing social goals obtain more favored consideration in obtaining TDF funding, the result will be to serve social goals irrelevant (no matter how arguably meritorious they might be from a social welfare view) to creating a competitive environment in which small businesses can operate successfully and help to fulfill the need for innovation and social responsiveness as core members of a vibrant industry, not as subsidized program recipients.

In response to the series of questions posed by the Commission which address the commercial difficulties of small businesses, ACTA focuses on the key role that the regulatory environment plays. Simply stated, access to capital, strategic partnering, the ability to compete for large users or contracts, etc., depend on the perception of potential private and public funding sources, potential customers and partners on the status accorded to small businesses in the regulatory scheme and attitudes. These attitudes are conveyed, not so much by lofty statements of concern for small businesses or by adoption of broad policies containing unquestionably valuable concepts for the betterment of small business entry and survival. Rather, the true judgment as to the status of small business in the regulatory environment will be gleaned by experienced observers from the record the Commission establishes for enforcement of these concerns and policies as applied to the reality of head-to-head competition and day-to-day operations in the marketplace.

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AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION ("ACTA")

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits it comments in response to the Notice of Inquiry ("NOI") issued May 21, 1996 and assigned GN Docket No. 96-113.

INTRODUCTION

ACTA applauds the efforts of Congress in enacting Section 257 of the Telecommunications Act of 1996 ("the Act") which requires the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services or in the provision of parts or services to providers [thereof]." ACTA is further encouraged by the Act's requirement that the Commission must promote "vigorous economic competition [and] technological advancement" along with the public interest, convenience and necessity. Id.

For its part the Commission has stated that it "will undertake specific initiatives that further the objective of Section 257 to reduce market barriers for small businesses." (¶ 2)[1] Further, ACTA notes that the Commission expressly focused on stated congressional concerns about the under-representation of minorities and women-owned small businesses in the telecommunications market. The Commission cites the statement made before Congress to this effect. Id. @ n. 9.

ACTA appreciates the concerns and the underlying reasons for those concerns and supports reasonable efforts to address them. However, these very legitimate concerns should not be understood solely in the context in which they were cited.

When speaking of "disregard[ing] the lessons of the past and the hurdles . . . still face[d] in making certain that everyone in America benefits equally from our country's maiden voyage into cyberspace," the concept should be applied so as to incorporate the under-representation of all small businesses without regard to race or gender ownership issues. Id. In ACTA's view, effectively advancing the interests of small businesses in general will achieve a significant expansion of the participation of minority and women-owned businesses as well. In short, the greatest assurance of achieving the broadest public interest benefits calls for the Commission to focus its remedial efforts on small businesses in general, rather than any specific subset thereof.[2]

Another guiding principle ACTA encourages the Commission to follow is to interpret the terms "entry barriers" in a commercially effective manner. The Commission should formulate

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[1] Citations are to the paragraphs of the NOI.

[2] Such an approach seems mandated by today's legal environment created by the U.S. Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995).

regulations and policies which not only remove entry barriers, but which also create a competitive environment which permits small businesses' ability to sustain and expand their market presence once entry has been achieved. Such negotiations would satisfy Congress' intent to remedy past wrongs.

First and foremost, such an interpretation requires the Commission to enforce the requirements of the Act, the FCC's own implementing rules and its pro-competition policies as fairly, effectively and promptly as possible. For example, weak enforcement of the Commission's resale policies and/or the Act's provisions barring unjust and unreasonable and discriminatory practices, particularly when involving competitors or competitive situations has in the past hampered and/or stopped small business growth within the industry.

Empirical evidence of such harm may be found in the complaints filed with the Commission and from even casual surveys of the status of various forms of resale operations - e.g., resale of AT&T's SDN and 800 services, and the small number of resellers of MCI services. It is significant also that only one new major national carrier has emerged in over 25 years of so-called competition in interexchange services, and it achieved its position by acquiring weaker companies, rather than by being able to grow through innovation, expansion of services and other methods that more truly demonstrate the competitive opportunity of a marketplace.

Moreover, ACTA submits that a study of the market's segmentation based on type of user would show that small businesses have been totally frozen out of serving the high-end of the marketplace. Large users, accounting for only 20% of the customer universe, nonetheless may account for 80% of total market revenues. It has not been due to any lack of management prowess or desire to serve these large users that have kept them from becoming customers of

small business carriers. Rather, the fact that the "Big Three" retain near total control over the communications needs of the high profit, high volume large user community is due in part to factors linked to their ability to control and manipulate the growth and profits of small carriers by both legitimate and illegitimate means.

More effective enforcement of existing rules and policies, along with future effective enforcement of new policies, is necessary if small businesses are to be able to fully participate in the marketplace, which ACTA defines quite simply as follows. To fully participate, small businesses should have the same opportunity to achieve the level of growth, the margin of profit, the ability to fund research and capital investment and to attract any type of customer that their labor, talent and management permits them to achieve without being handicapped or harmed by the misuse and abuse of the inherent competitive and other advantages their large incumbent competitors possess. To ACTA, this means the Commission must increase its oversight and enforcement efforts and its ability to act promptly and decisively when presented with evidence of competitive abuse.

What is suggested by the foregoing is that the Commission's own processes, procedures and attitudes towards its mission can be and at times in the past have acted as barriers to small

business entry and its ability to sustain or improve successful operations.[3] This obviously must be addressed before other exogenous barriers are addressed.[4]

IMPROVEMENT TO COMPLAINT PROCESS

FCC Complaint Procedures

The FCC has two forms of complaint procedures - informal and formal.

Informal. The present informal complaint procedures consist of an informal filing (usually a letter) which is then served on the carrier whose action, rates, etc., have prompted the complaint. The complaint letter is then officially served on the carrier which is given 30 days to respond in writing. In addition, in a new procedure recently adopted, the carrier is to notify the complainant as soon as it receives the FCC's official notice. The carrier then files its response which the FCC serves on the complainant. For all practical purposes the process ends at that point. The complainant's only option, if left unsatisfied, is to file a formal complaint within 6 months of the receipt of the carrier's official response.

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[3] In 1986, after the Commission adopted access charge reform on WATS lines, which was feared meant the end of resale carriers, a sitting Commissioner who spoke at an ACTA conference told attending ACTA members in no uncertain terms that the Commission's resale policy had given many of them the opportunity to make a lot of money and that they had no cause to complain if a change in Commission policy threatened their continued viability. At that time, resale was viewed as a limited means to an end. Since then, resale services have not only survived changes in policy, but demonstrated its worth as more than an interim measure to achieve other public interest goals. Today, resale of services is interwoven into the fabric of competitive communications delivering substantial benefits to the public. Even resale's dark nemesis, AT&T, now lauds the virtues of resale and curses the tactics of those who would frustrate its use, ironically railing against the very same type of anti-resale practices AT&T has used and perfected and continues to use to frustrate the resale of its services.

[4] The Commission's NOI specifically requests commenters to identify whether small businesses have particular difficulties regarding FCC policies or rules and whether any barrier is a statutory requirement or government regulation (¶¶ 25, Q8 and 26).

For the end-using public, this procedure is largely effective. Most of the end-users' complaints are based on alleged slamming, excessive rates, etc. For small carriers, this type of complaint does not warrant the expenditure of significant legal fees to defend and settlement is usually reached - forgiveness of charges, credits, etc. In some cases, where a monetary or other settlement or concession is not involved, the filing of the carrier's response usually ends the matter whether or not the complainant is satisfied. Most end-users do not follow up with a formal complaint because of the cost involved.

Formal. The FCC's formal complaint is a modified administrative trial-type proceeding. It is initiated by a complaint, in content and style very like a complaint filed in a court of law. The carrier submits an answer and limited discovery is a matter of right, with broader discovery available upon request, supported by a showing of good cause. Almost all formal complaints are settled by the parties. Most never result in the taking of depositions, or actual hearing. FCC records would indicate that in the past ten years, or longer, no formal complaint has ever been set for hearing with the examination of witnesses, save for one case, and that too was eventually settled before witnesses were required to appear and give testimony.

FCC Complaint Process in Disarray. Formal complaints languish without action for years. This results in the parties agreeing to dismiss the complaints with their rights and obligations and compliance or non-compliance with the Communications Act not only unresolved, but unaddressed. Even in cases where complaints remain unprosecuted for years, the Commission apparently finds it difficult to make a determination to dismiss for want of prosecution. The result is that a number of formal complaints simply sit and rot without action, making a mockery of the FCC complaint process and its usefulness as a tool to enforce FCC rules and policies.

Additionally, there is a perception - a perception that is believed is accurate and would be supported by Commission records - that the Commission's handling of formal complaints involving the larger incumbent carriers in the industry, would reveal far more activity and formal attention than complaints filed by small carriers against those incumbents for alleged infractions of the Communications Act and FCC's policies, particularly the policies favoring competition and resale. According to one source, as many as 55 unresolved complaints by resellers against AT&T have languished at the FCC for years.

Indeed, several years ago, Congress was driven to pass a special provision addressing the lack of performance by the FCC on complaints. In an amendment to the Communications Act, Congress directed the FCC to act on complaints based on tariffs within 12 months of filing. An additional 3 months were provided if the complaint raised particularly difficult issues.

The response of the FCC was predictable. Rather than taking the congressional action at face value, it immediately attempted to find ways to interpret the nature of complaints as not being based on tariffs to avoid the time limits Congress has imposed. A check of Commission records would in all likelihood reveal that the congressional directive has limited to no effect on the Commission's handling of complaints.

Defeatist/Shirking Practices. The lack of effective complaint procedures is compounded by other FCC attitudes and practices which further weaken, and render ineffectual, the complaint process. FCC policy in handling complaints is driven first by a desire to avoid as much work as possible. Hence, complaints sit and languish until the complaining party gives up for lack of resources to carry forward, because it has either absorbed the damages caused and has been able to

move on or has been so damaged as not to be able to sustain its prosecution of the complaint. Larger carriers are well aware of this problem and take as much advantage of it as possible.[5]

One recent time the Commission has "gotten tough" on complaints is symptomatic of its attitude of reducing complaint volume and the workload it produces. On slamming, the FCC has sent a clear message that carriers will be held accountable with respect to any extenuating circumstances and will be heavily fined if merit is found to exist in the slamming complaint. The quarrel is not so much with the intent and purpose of such a "get tough" policy, it is that: (1) it shows the Commission can enforce an effective complaint process and act swiftly and decisively in short order; (2) the Commission will do this in order to reduce its work load and for the political benefit of appearing to the public to be a watch dog of their interests; and (3) once having determined its course of action, it will move rigidly forward, punishing guilty and innocent alike, brooking no excuse or defense. Small carriers attempting to compete with the entrenched incumbents, who could also benefit significantly from a similar "get tough" policy on ensuring

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[5] In the past few years, to escape even the ineffectual formal complaint process, some of the larger carriers have tariffed provisions or placed in their contracts, provisions requiring mandatory arbitration. The effect of this provision is to skirt altogether any oversight by regulatory authority and increase the burden of going forward with a complaint against carrier practices onto the entity victimized by its practices. "Arbitration" as defined and applied by such carriers takes the form of giving the entity with the complaint the opportunity to agree with the carrier's position, which if not immediately attained, results in the necessity of conducting a hearing in any event with similar, if not identical costs, and with the added downside that laymen arbitrators lack the communications law experience to understand the true extent of a carrier's obligations under the Communications Act, FCC rules or policies and court decisions, despite the presentation to the arbitrators of the necessary precedents and citations of such authority. Compounding this problem is the rules on arbitration. An arbitrator's decision is essentially unreviewable except for fraud or similar deliberate misconduct. Errors of law and/or fact are not reviewable. While carriers which have tariffed arbitration provisions cannot be assured that process favors them, they have a strong basis to believe that it does. Experience indicates that their reliance is not misplaced.

compliance with the law and policies on resale, promotion of competition and increasing opportunity for small businesses to compete in the telecommunications industry, receive no such concern or protections and are left high and dry, to fend for themselves.

There is another pernicious abuse of the complaint process. The Commission uses it to avoid making decisions in other proceedings on issues with which it does not want to deal or cannot deal, lest in doing so it prevents it from reaching the determination that has been "lobbied" through by the special interests affected by the FCC's determination. Hence, when a group of small carriers protested AT&T's applications to acquire McCaw Cellular on the basis of AT&T's anti-resale, anti-competitive practices for which several formal complaints were pending, the Commission ducked the issue by stating it would handle the issues in the complaint process. Of course it never did and AT&T got its approval to acquire McCaw and gain a significant advantage in the marketplace by having combined its then-dominant presence in long distance with the single largest cellular provider in the U.S.

Evidence that the incumbent carriers will use every advantage, trick and device to co-op competitive inroads is everywhere. The FCC simply needs to deal with that evidence in an effective and fair manner. It cannot do so under its present attitude toward complaints and without adopting new procedures which avoid continuing to proceed in a manner that makes the process itself a major barrier to small businesses participation in the industry.

Proposals for a New and Effective Informal Procedure. Justice delayed is justice denied. Small competitors need rapid redress of competitive wrong-doing by the entities on which they must depend to obtain the facilities and services necessary to themselves provide service to their customers and with which they are in direct competition.

While it may be argued that as between carriers (large and small) and end-users, the present informal complaint process is not wholly ineffectual, that process is clearly ineffectual in resolving disputes between competitors, particularly competitors of such different size and resources.

ACTA recommends that the Commission develop new informal procedures which have the following elements:

* A staff, with the necessary resources, skills, dedication and backing of the Commissioners, to address the competitive, technological, financial, business and economic issues that are involved in the relationships between new, small entrants and the entrenched incumbent monopolists.

This staff would be trained in principles of trade law, deceptive practices, predatory practices, and anti-competitive practices and be directed to evaluate factual circumstances of cases brought to their attention on the basis of the historical record of anti-competitive practices that is legend in the telecommunications industry (dating back to 1875).

Additionally, the staff should be populated with experienced personnel with backgrounds in the law, technology and economics. Three person teams would be formed to ensure that the requisite talents were available to address and resolve complaints as they come into the Commission. The need for the participation of all three members of the team on any one complaint would be determined at the outset and the extent of each expert's participation determined at that time.

* Access to these teams should be permitted by telephone, correspondence, e-mail, the Internet, visitations.

* Access would start by contacting a team, presenting the facts and counter statement and determining the issue presented as soon as practicable, even the same day, circumstances permitting.

Hence, it is contemplated that decisions would be entered over the phone, with all parties present and participating.

* After initial contact is made, if more information, briefs of the law, etc., are deemed necessary to determine the issue, the parties would be requested to agree on a time table for submitting the additional input. If the complaining party objects to a defending party's "need" for excessive time to respond, the team leader should determine time frame, with emphasis on the need for prompt resolution. While each case may have its own needs, the standard should be to render decisions within no more than 30 days from the receipt of the initial notice of complaint.

* The standard of judgment on whether or not to grant a complaint and the nature or relief must rest on the promotion of competitive provision of services, be based on the knowledge of the past use of bogus excuses involving network harm, etc., the present motivation to control the inroads of competition at any cost, etc., and the public interest in ensuring that competition, and specifically competition offered by small businesses is to be promoted and advanced. Concerns for the incumbent's natural desire to protect its economic interests against any possible exposure should play no role.

* Decisions granting complaints would evaluate the risk of exposure to other interests by fashioning reasonable protections - the requirement that a reasonable bond be posted, with the emphasis on "reasonable." The guide should be one that has been around for over 60 years - the provision in Section 406 of the 1934 Act which allows the federal courts to order a carrier to render service first, then address ant financial exposure risks after the service has been provided.

* In cases in which a determination to order service cannot be rendered promptly, should a later determination be made that there was no substantial basis for objection, the carrier denying

service should be required to pay all the complainant's costs to obtain a decision, including reasonable attorneys' fees, plus reparations for the damages (additional costs, lost business/revenues, etc., to the extent credible proof is submitted to support such claims). Damage claims would be handled by separate teams or authorities within the Commission so as not to interfere with the complaint team's ability to handle and resolve complaints.

* Policy statements and/or rules would also notify complainants that they would be responsible for the carrier's costs should the basis of their demands prove to be frivolous.

* Expedited appeals to the Commission would be provided. However, given the delays that would be attendant on an internal appellate process, rules could be fashioned to permit the option to declare a team ruling final, so that judicial review would be available immediately. In certifying the team's ruling final, the Commission would be implicitly or could explicitly declare that no issues requiring the further exercise of its expertise is involved.

* An additional significant benefit of an approach to prompt decision-making on complaints, is the rapid development of a body of precedent by which all members of the industry would be guided. This alone would reduce the number and frequency of complaints, at least on similar or identical issues. Hence, while at the outset, the burden to implement and sustain such a quick-paced procedure will be significant, the very real promise is that by decisive and prompt action, the need to resort to these procedures would decrease.

* Proof of the potential additional benefits discussed in the preceding paragraph may be found in the success of the present-day approach to slamming complaints and the FCC's experience years ago with non-duplication waiver requests filed by cable TV systems. In the first case, the no-nonsense approach has been immediately understood by the industry and the potential for voluntary

compliance increased. In the second, the build-up of a body of decisions established the basis for rapid action which together eliminated the filing of such waivers - where the benefits of delay in compliance by seeking waivers was eliminated, the futility of filing waivers became apparent and the filing for waivers was itself eliminated.

A LISTING OF OTHER SPECIFIC BARRIERS

ACTA applauds the Commission's defining the practices which constitute bad faith in the negotiation of interconnection agreements for purposes of providing competitive local services. It is this type of pro-active regulatory determination that is required to expedite the establishment of competition. Building on this approach, the following is a list of barriers arising from government regulatory decisions, policies, practices, procedures and regulations for which solutions hopefully may be found as a result of this NOI and subsequent follow up.

No more ONA. Acknowledging the need not to disregard the lessons of the past, the Commission must ensure that the regulatory mistakes made in administering the Open Network Architecture scheme are not repeated. Essentially this means not abandoning stiff pro-competitive conditions such as separate subsidiaries in favor of non-workable, ineffective "non-structural safeguards."

Shunning of regulatory responsibility, such as in the case of dealing with the unfair competitive aspects and economic deficiencies of Internet telephony. Fair is fair and denying the existence of a very real problem which threatens the ability of small carriers to compete, or to participate in a new environment, is the antithesis of bringing down barriers to small business entry and participation in the industry.

Ingrained official non-recognition of the "500 carriers" as actual businesses except when their existence is needed to justify further favored regulatory treatment of incumbent "super carriers." This has a devastating impact on the credibility of small carriers as legitimate players in the industry which makes access to financing next to impossible.

Delegation to the 51 state jurisdictions the duty to see to the detailed implementation of the requirements of the 1996 Act. Small carriers will be hard pressed to accommodate the costs of 51 compliance programs, even if administered on an even-handed basis.

Failing to maintain reasonable controls over the ability of incumbent super carriers to exploit their massive resources to their benefit and to the deliberate disadvantage of their smaller competitors. For example, the absence of a consistent policy requiring equal access for IXCs to cellular systems is as inexplicable as it is inexcusable. Similarly, tolerating a cellular incumbent's refusal to provide interconnection to, or to allow resale of services by, a resale cellular carrier, is a blatant barrier to small business entry and existence in the industry.

Any degree of tolerance for "excuses" of incumbent carriers for their failure to provide interconnection, unbundled network elements, dialing parity, etc.

Accepting superficial demonstrations of compliance with the competitive check-list for in-region entry into the interexchange market by the BOCs.

Improper management of the Telecommunications Development Fund. Without meaning to cast any aspersions on any individual, the message sent by the Commission's appointment of an officer of an RBOC as the Chairman of this "small business" funding apparatus is easily perceived as either that: (1) a candidate from the small business community could not be found who would be well enough regarded to assume so prestigious a post; (2) the Commission never

bothered to consider such a candidate for reasons yet to be learned; or (3) the Fund is to be administered so as to be perceived as achieving its purpose without in any way endangering the most important interests of the incumbent carrier community.

Tolerance of onerous state requirements, whether they involve unreasonable regulatory requirements, such as overly demanding anti-slamming requirements, overly specific billing requirements, or unreasonable financial burdens, such as the plethora of local taxes being increasingly imposed on telecommunications services by cities, towns, or other state and municipal authorities.

Application of the USF formula as presently contained in Rule 69.5. This rule severely penalizes small companies for achieving a degree of success measured by the number of prescribed lines it services. The problems stem from several inherent factors. The use of a formula based on the number of lines without regard to the revenue generated by those line. The on-going and unremedied abuses that have crept into and become attached like barnacles to the program. The delay in resolving the proceedings instituted to overhaul the program. The fundamental flaw on which the program was originally based - the imposition of what is essentially a social welfare program, which rather than being funded by tax dollars, is exacted from a small segment of the IXC community in the telecommunications industry.[6]

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[6] The USF program was adopted after Divestiture at which time there was concern over the financial stability of the RBOCs once separated from their mother ship, AT&T. Whatever validity such concerns had then, have long since evaporated, but no change in policy has been effected. The result has been that multi-billion dollar corporations, which incidently have equaled or outperfomed AT&T in overall financial results since Divestiture, are now being partially subsidized by a few very small (in comparison) IXCs "unlucky" enough to have built their businesses to such a level of prescribed lines as to qualify to pay the USF "tax." The USF funding imposition on these small companies can mean the difference between making a profit

(continued...)

Other sources of regulatory barriers can be found in the history of deregulating or not regulating the "once dominant" carrier - AT&T. This history includes (1) the failure to effectively enforce AT&T's duties to allow resale of its SDN services, its Tariff 12 VTNS offerings, and its 800 services; (2) its authorization to operate by contract tariffs on the condition and pledge that these contract could be resold, but which then AT&T proceeded to frustrate their resale by various means; (3) the invention of the "net revenue test" which permitted AT&T while dominant to avoid allegations of predatory pricing; (4) official tolerance of AT&T's ability to use its huge financial resources to "buy" customers by, for example, paying huge commissions to pay phone premises owners[7] and the use of $75-100 checks to buy or buy back residential users; * refusal to open up AT&T's calling cards to competition; and (5) the acquisition of the largest cellular carrier followed by the repeal of AT&T's equal access obligations.

Small businesses have been similarly hampered by pro-incumbent attitudes favoring the RBOCs, such as: (1) the continuing tolerance of the present USF program; (2) failure to adopt and maintain effective rules by which to open the local exchanges to enhanced service competition under the ONA program;[8] (3) tolerating the RBOCs initiative to skirt the

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[6] (. . . continued) or not.

[7] Conversely, small pay phone providers attempting to compete by offering equally high commissions, resulting of necessity in rates higher than AT&T's, were and are roundly criticized for charging exorbitant rates, and subjected to enforcement proceedings or even more onerous regulations. Rubbing salt in the wounds, AT&T's rates are then viewed as the standard of reasonableness, which if exceeded by a small competitor in order to cover its higher costs of competing are considered presumptively unreasonable and unlawful.

[8] Prime examples of overly favorable treatment under ONA, which ensured that its intended effectiveness in opening the local exchanges to competition in providing enhanced services was doomed from the outset, include (in addition to the abandonment of the separate (continued...)

interexchange prohibition of the MFJ by use of debit cards; (4) inclusion of access charges in the pricing structure of network elements; and (5) approval of a CEI plan authorizing the offering interexchange services without compliance with the requirements of the 1996 Act in the guise of providing Internet access.

In the end, as small businesses operating in a regulated industry, the most significant barrier to entry and the opportunity for longevity thereafter resides in the perception by the financial community, customers, suppliers and larger competitors of the status of those businesses in the regulatory scheme and environment. Since the Commission and the state commissions are the principal authors of that scheme and environment, it is they that must bear the responsibility for ensuring that they, their actions and inactions and their policies do not become or remain the principal barrier to small business entry and longevity.

INFORMATION ON SERVICES AND RESALE

Ownership: The information available to ACTA indicates that many small carriers are privately held corporations with a small number of shareholders. ACTA believes that ownership patterns of small long distance carriers parallel to some degree the patterns found in the independent telephone area which is also characterized by privately held corporations, with a small number of shareholders, in many cases having a familial relationship. ACTA does not have a breakdown of the percentages of ownership by race or gender. It is ACTA's position that if the regulatory and other barriers on small business entry and continuing operations in general are

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[8](...continued)
subsidiary requirement already mentioned): the weakening of the separation between the RBOCs internal regulated exchange services arms and their competitive enhanced services marketing arms and the weakening of the protections against their ability to leverage their access to a customer's CPNI gained from their regulated services arm for use to enhance their competitive services arms.

lifted, this will generally improve the opportunities for increased participation by minorities and women in the ownership of telecommunications service providers.

Services: Services offered are generally the traditional outbound and inbound services, including calling or travel cards, which often incorporate enhanced features, such as facsimile, voice mail, and certain information services, such as weather, news updates and so forth, and directory. Niche market companies also exist. The core offerings of these companies are other than the traditional services, such as operator services, debit card offerings, international services or conference calling. These companies recognized that the market is rapidly changing and are beginning to expand their offerings to include paging, wireless services, and even Internet access.

Geographic Regions: While many traditional resale carriers continue to operate on a localized basis defined by the location of their central office(s) and the calling area served thereby, switchless resale has made national operations possible for many more carriers. IN addition, some carriers have branched out and established foreign subsidaries in Canada and the U.K. in an effort to expand operations on a more global basis as competitive policies in foreign countries change to permit such activities.

Primary Markets: In theory, there is no market segment foreclosed to small carriers. In reality, most small carriers are most heavily dependent on small business customers. Service to residential and government customers, while being served by some small carriers, remain mostly within the preserve of the incumbent carriers. It is difficult to compete with incumbent carriers able to spend $3 billion in national advertising, or to offer $75 to $100 to have a customer sign up. Of greater concern, as addressed elsewhere in these comments, the high profit,

high volume, large user community remains almost the exclusive preserve of the large incumbent carriers.

Capital Requirements: Traditional capital markets are not readily available to most entrepreneurial startups seeking entry. This also is true as to expansion. Many carriers which have achieved success at the market levels at which they are permitted to operate find it difficult to obtain the capital required to acquire their own network facilities. The pricing structure for entry facilities and similar access components are prohibitively expensive without access to outside financial resources. A further contributing factor is the extreme disparity in size and resources of market participants. To all the world, there are but three long distance carriers. The other "500" get recognition only it seems when it becomes necessary to justify further deregulation of the incumbent carriers or to fashion some other equally favorable change in regulatory policy. Of course now, there will be seven additional large players attempting to corner a share of the market pie. With the advent of the necessity to enter the local exchange markets, the need for capital will increase, but ACTA fears that so will the difficulty in attracting outside sources of capital to fund this expansion of service.

ACTA encourages the Commission to give this area particularly close attention. In doing so, ACTA believes it essential that the use and availability of the Telecommunications Development Fund ("TDF") be given top priority. The goal should be to fashion the principles on which a small business carrier may qualify for funding from the TDF based on prudent business goals and financial needs relevant to achieving those goals. The distinction ACTA seeks to draw here is as follows.

Government funding programs usually emphasize the desire to fund proposals with unique social goals or perceived advancements in technology or other areas (no matter how fanciful). While both understandable and, in many cases justified, such approaches can and do ignore legitimate needs and interests, which often hold the promise of more realistic and lasting benefits to broader public interests.

Such is the case as ACTA perceives it with the TDF. That is, small carriers seeking funds to expand operations through the construction or by investing in the equivalent of a capital lease in order to obtain their own networks or facilities, should be given equal or even a priority in qualifying for financial assistance from the TDF. The availability of TDF funding should not rest solely or even primarily on proposals to create some new technology, or provide the equivalent of some social program. Rather, by helping small businesses grow by funding traditional business needs, the TDF will have a far better chance of actually advancing the public interests by creating the financial stability needed to do more venturesome projects in the future.

OTHER BARRIERS

The Commission forthrightly asks a series of questions concerning entry barriers (¶ 25). Several of these questions have already been addressed by ACTA hereinabove. Responses to some of the additional questions posed by the Commission follow.

Deposits: Deposits are a common business practice and in many business situations are appropriate and fair. What the Commission must be aware of, is the use of deposits as an anti-competitive barrier to the entry of small carrier competition or to its expansion. Given the structure of the long distance industry which will be mirrored in the local competition arena, the Commission is encouraged to view high deposits as a weapon to bar entry or expansion of

operations and to adopt policies, rules and oversight/enforcement procedures to eliminate their abuse.

Inherent Small Business Disadvantages: Questions 8 through 12 posed in paragraph 25 of the NOI may all be answered in the affirmative. Yes, small businesses face more difficulty in obtaining government "benefits;"[9] particularly, as outlined previously in these comments, in receiving prompt and effective redress for their legitimate grievances.

At the same time, it must be made clear that ACTA is not suggesting that each time a small business fails to obtain a government "benefit" (Q8), loses out to single bidder (Q9), fails to attract a strategic partner (Q10), confronts unfavorable terms in attempting to form alliances (Q11), or faces particularly unique obstacles not faced by small businesses in other industrial sectors (Q12), it is due to factors within the duty or authority of the Commission to rectify. Realistically, small businesses in any industry face inherent disadvantages which is it not the government's duty to cure. What small businesses have a right to expect from their government is that the policies it adopts, the enforcement procedures it practices, the receptiveness it demonstrates to their concerns and needs do not add to those inherent disadvantages. Small businesses further have a right to expect their government to exercise keen vigilance to spot abuses ,preparedness to be able to act competently and expertly when abuses occur or are brought to its attention and the willingness and single mindedness to act promptly and decisively to remedy those abuses proven to have occurred or to be occurring.

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[9] ACTA would expand the concept here by including assistance, treatment, recognition and attention as among the government "benefits" small business have difficulties obtaining.